No. 94529-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

HBH; SAH; and TREY HAMRICK, litigation guardian ad litem on behalf of KEH, JBH, and KMH,

Plaintiffs/Respondents,

vs.

STATE OF WASHINGTON,

Defendant/Petitioner.

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of
Washington State Association for Justice Foundation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions and Statutes

Other Authorities

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation has an interest in the rights of persons seeking redress under the civil justice system, including an interest in a foster child's right to protection stemming from the special relationship between the State and foster children in its charge.

II. INTRODUCTION AND STATEMENT OF THE CASE

This review presents the Court with the opportunity to determine whether the State has a special relationship with the children it places in the foster care system under the supervision of the Department of Social and Health Services (DSHS), giving rise to a common law duty of protection. Plaintiffs filed this action against DSHS for failing to protect them from sexual and physical abuse they suffered at the hands of their foster parents. The facts are drawn from the Court of Appeals' opinion and the briefing of the parties. *See H.B.H. v. State*, 197 Wn. App. 77, 387 P.3d 1093 (2016), *review granted*, 189 Wn.2d 1002 (2017); H.B.H. Op. Br. at 4-13; State Resp. Br. at 4-17; State Pet. for Rev. at 4-9; H.B.H. Ans. to Pet. for Rev. at 1-6.

Between February of 1998 and January of 2000, DSHS placed Plaintiffs, minor children at the time, in foster care with the Hamricks. All were eventually adopted. Beginning with their foster placement and continuing after their adoption, Plaintiffs state they were sexually abused by their foster father and physically abused by their foster mother.

Plaintiffs argue that DSHS negligently failed to fulfill its duty to protect them during the foster period, when it retained supervisory authority over their safety. Specifically, Plaintiffs state DSHS 1) failed to act on evidence the children were acting out sexually, 2) failed to follow up with one of the Plaintiffs who had requested a private meeting with a caseworker, and 3) failed to conduct mandatory face to face safety checks, as required by DSHS policy. DSHS began receiving actual reports of abuse approximately five years after the children were adopted. In 2011, the Pierce County Sheriff's Department opened an investigation into the allegations of abuse, and DSHS removed the children from the home.

Plaintiffs brought suit against DSHS, claiming it negligently failed to protect Plaintiffs during the pre- and post-adoption periods. Trial was held in February of 2015. Following the close of both parties' cases, the trial court granted the State's motion for judgment as a matter of law as to negligence during the pre-adoption period. The court acknowledged

mandatory safety checks were not conducted, but concluded the State had no duty to protect the children while in the care of the foster parents.[1]

Plaintiffs appealed. The Court of Appeals reversed and remanded, holding that DSHS has a special protective relationship with the foster children in its charge, creating a "duty of reasonable care to investigate the health and safety of children it places in foster homes." *H.B.H.*, 197 Wn. App. at 85-86. The State petitioned for review, which this Court granted.

III. ISSUES PRESENTED

(1) Under the State's waiver of sovereign immunity, is DSHS subject to a common law duty to protect children in foster care from harm caused by third parties, including foster parents?

(2) Does DSHS have a special relationship with the foster children in its charge, giving rise to a duty of protection?

IV. SUMMARY OF ARGUMENT

Under the State's waiver of sovereign immunity, the State may be held liable to the same extent as if it were a private party. The text and policies underlying the waiver statute support broad government accountability, including when government engages in conduct that is not undertaken in the private sector. When a plaintiff asserts a claim against the

[1] The court also granted the State's motion for judgment as a matter of law with respect to certain allegations of negligence during the post-adoption period. The remaining claims went to the jury, which found for the State. These issues are not raised on review.

government under the common law, liability may attach if the challenged conduct falls within the reach of an established common law doctrine.

While the general rule is that a defendant has no duty to prevent a third party from harming another, an exception to this rule permits liability where there exists a special relationship between a defendant and either a perpetrator or victim of harm. The special relationship between a defendant and a victim of harm triggers a duty to protect, and rests on the defendant having been entrusted with the well-being of a vulnerable person and not necessarily on the retention of physical custody. As the entity entrusted with responsibility for removing children from their homes and placing them in the foster system, the Court should hold that DSHS has a duty under the common law to protect the foster children in its charge.

V. ARGUMENT

The State presents two arguments disputing liability. First, it claims sovereign immunity because DSHS performs a function that has no counterpart in the private sector, *i.e.*, there is no "private analogue." Second, it

asserts the common law duty to protect requires custody, and does not apply to the relationship between DSHS and foster children in its charge.[2]

A. Sovereign Immunity Is Not Warranted.

The State argues that its conduct here involves a governmental function that is not equivalent to conduct undertaken by a private entity, and it is thus immune from liability. *See* Pet. for Rev. at 12-14; State Supp. Br. at 19-22. It argues: "In the absence of analogous private sector conduct, the waiver of sovereign immunity does not encompass common-law liability for negligent foster care administration." Pet. for Rev. at 12.

1. Neither the text of RCW 4.92.090 nor the policies on which it relies support sovereign immunity merely because the challenged conduct is undertaken only by the government.

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[2] Similar arguments have been presented to courts in other jurisdictions involving waiver statutes similar to Washington's. *See Donahoe v. State*, 135 Wn. App. 824, 843-44, n. 14, 142 P.3d 654 (2006) (examining out of jurisdiction cases). It appears these arguments have generally been rejected. *See, e.g., Sabia v. State*, 669 A.2d 1187, 1192-96 (Vt. 1995) (State's claim of immunity due to no "private analogue" rejected by Court where abused foster children stated a common law claim against the State for, *inter alia*, failure to protect under Restatement (Second) of Torts § 315(b), despite the absence of a custodial relationship with the children); *LaShay v. Dep't of Soc. & Rehab. Servs.*, 625 A.2d 224, 229 (Vt. 1993) (State's claim of immunity due to no "private analogue" rejected by Court for claims by foster children for failure to protect, noting that "private persons entrust the care of children in their custody to other parties such as teachers, day care workers and babysitters. [The State] was not performing a uniquely governmental function by delegating care of a child in its custody to another person" (brackets added)); *Dep't of Health & Rehab. Servs. v. Yamuni*, 529 So.2d 258, 260 (Fla. 1988) (State's claim of immunity due to no "private analogue" rejected by Court for claims for negligent handling of child abuse complaints, noting that such construction would "essentially emasculate the [waiver of immunity] and the salutary purpose it was intended to serve" (brackets added)); *Kaho'ohanohanos v. Dep't of Human Servs., State of Hawaii*, 178 P.3d 538, 562 (Haw. 2008) (holding that a private analogue was present in the form of a "special relationship" duty to protect a child under Restatement (Second) of Torts §315(b)).

The Washington State Constitution, Art. 2, § 26, provides: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." In 1961, the Legislature waived sovereign immunity from civil liability. Laws of 1961, ch. 136, § 1 (codified as RCW 4.92.090).[3] The waiver statute provides: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." RCW 4.92.090.

Notably, the waiver statute provides only that the government shall be liable "to the same extent *as if* it were a private person or corporation." The italicized language suggests a private entity need not actually engage in the same conduct, but that if it did, it may be subject to a duty of care in tort. *See* Debra L. Stephens and Bryan P. Harnetiaux, *The Value of Government Tort Liability: Washington State's Journey From Immunity to Accountability,* 30 SEATTLE U. L. REV. 35, 54 (2006). The court has construed the reference to "private person or corporation" to require only that allegedly tortious conduct "be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation." *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253, 407 P.2d

[3] RCW 4.92.090 is reproduced in the Appendix to this brief.

440 (1966). This view is consistent with the Court's holdings that liability may attach for conduct typically undertaken only by government. *See, e.g., Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992) (liability of parole officers); *Emsley v. Army Nat. Guard*, 106 Wn.2d 474, 722 P.2d 1299 (1986) (negligently firing National Guard artillery); *Stewart v. State*, 92 Wn.2d 285, 597 P.2d 101 (1979) (negligent roadway design); *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975) (negligent licensing of drivers).

The policies underlying the State's waiver of sovereign immunity recognized by this Court support government accountability. *See Savage v. State*, 127 Wn.2d 434, 446, 899 P.2d 1270 (1995) (noting that "maintaining the potential of state liability, as established in RCW 4.92, can be expected to have the salutary effect of providing the State an incentive to ensure that reasonable care is used"). This policy serves "to make the State presumptively liable in all instances in which the Legislature has not indicated otherwise." *Id.* at 445.

2. Because the government's conduct falls within an existing common law doctrine, any so-called "private analogue" requirement is inapplicable.

The Court has recognized the waiver statute was not intended to create new causes of action and that claims against the government must therefore be grounded in existing theories of recovery. *See LaPlante*, 85

Wn.2d at 159 (noting the "basic elements of an alleged tort must still be established before the State is deemed liable"); *see also Chambers-Castanes v. King County,* 100 Wn.2d 275, 288, 669 Wn.2d 451 (1983) (observing abrogation of sovereign immunity "did not create duties where none existed before").

In *M.W. v. Dep't of Soc. & Health Servs.*, 149 Wn.2d 589, 601, 70 P.3d 954 (2003), the Court recognized the waiver of sovereign immunity includes waiver for liability arising from common law torts, and the Court will apply common law principles to determine whether a recognized duty may properly be applied to challenged government conduct:

> DSHS has an existing common law duty of care not to negligently harm children. . . .The legislature established the right to sue the State for common law torts when it waived sovereign immunity. Laws of 1963, ch. 159, §2, codified at RCW 4.92.090. ("The state of Washington... shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.") The State and its subdivisions have since been held to the same general duty of care to which private individuals are held – that of a reasonable person under the circumstances... Whether the facts in the present case are actionable at common law is not before us.

Id. at 600-01; *see also Bishop v. Miche,* 137 Wn.2d 518, 529, 973 P.2d 465 (1999) (noting with the waiver of sovereign immunity "governmental entities may be subject to tort claims under common-law principles," including those "embodied in the Restatement (Second) of Torts §§ 315, 319

(1965), and addressed in *Petersen v. State*"); *Hertog v. City of Seattle*, 138 Wn.2d 265, 278-79, 979 P.2d 400 (1999) (stating the common law take charge duty "is well-grounded in tort principles which apply equally to private and to governmental entities").

The State appears to concede that if there is a special relationship between DSHS and the foster children in its charge, a common law duty to protect may lie against the State, meeting any private analogue requirement. *See* State Supp. Br. at 21 (arguing "DSHS's statutory responsibilities do not, standing alone, create a §315(b) special relationship between DSHS and foster children," but allowing that if they did, it "would itself be a private sector analog"). The State's argument thus turns on whether there exists a special relationship between DSHS and the foster children in its charge, thereby triggering a duty of protection.

B. The Special Relationship Between DSHS And Foster Children In Its Charge Gives Rise To A Common Law Duty To Protect.

The State urges the Court to limit the special relationships giving rise to a duty of protection to those involving physical custody. State Supp. Br. at 12.

1. Overview of the special relationship doctrine and the duty to protect under Washington law.

This Court established the general rule of tort liability for the acts of third parties in *Petersen v. State,* 100 Wn.2d 421, 671 P.2d 230 (1983). Adopting the rule set out in the Restatement (Second) of Torts § 315 (1965), the Court held that while there is generally no duty to prevent a third party from causing harm, an exception to the "no duty" rule may be found where a special relationship exists between the defendant and either a victim or perpetrator of harm. Section 315 provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives the other a right to protection.

The imposition of a duty in either circumstance reflects a determination that there is "some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." *See* W. Page Keeton et al., Prosser and Keeton on Torts § 56, at 374 (5th ed. 1984).[4] Foreseeability then functions to define the scope of the duty. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 50, 929 P.2d 420 (1997).

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[4] The Plaintiffs do not argue that a special relationship exists under § 315(a) or § 319, and any duty to control the Hamricks owed by the State is not addressed in this brief.

Comment c to § 315 states that the relations described in § 315(a) triggering a duty to control are stated in §§ 316 - 319, and the relations in § 315(b) triggering a duty to protect are stated in §§ 314A and 320, implying that these related provisions are specific permutations of the general duties described in 315.[5] In its recent opinion in *Volk v. Demeerleer*, 187 Wn.2d 241, 386 P.3d 254 (2016), however, the Court clarified that the duty to control under § 315(a) and the related "take charge" duty under § 319 are conceptually distinct:

> We have never read *Petersen* . . . as requiring that a relationship meet the requirements of both §§ 315 and 319 before a duty of care is imposed. Sections 316-319 define the 'types of duties' that will meet the requirements of § 315, but we have never held that they are the only relationships that will trigger the § 315 duty to a putative victim.

Volk, 187 Wn.2d at 262, n.11. In light of this analysis, it is unclear to what degree the Restatement sections related to the duty to *protect* under § 315(b) — §§ 314A and 320 — may be understood as the only permutations of the duty articulated in § 315(b).[6]

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[5] Restatement (Second) of Torts §§ 314A, 315 and 320 are reproduced in the Appendix. These Restatement sections involving a duty to protect are reflected in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40 (2012). Recently, the Court relied on the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 41 cmt. g (Am. Law. Inst. 2012) to find a duty to control in the context of outpatient psychiatric treatment. *See Volk v. Demeerleer*, 187 Wn.2d 241, 273-74, 386 P.3d 254 (2016). The parties have not addressed the applicability of the Third Restatement in the context of the duty to protect.

[6] While the parties' briefing appears to focus on § 315, the relevance of §§ 314A, 319 & 320 are addressed as well, both in the briefing and in the Court of Appeals opinion. *See* Ans. to Pet. for Rev. at 13 n.10, 21; *H.B.H.*, 197 Wn. App. at 88.

The text of § 315(b) announces a rule triggering a "right of protection" based on a special relation between the defendant and the victim of harm. Section 315(b) contains no reference to custody. The "related" Restatement provisions to the duty under § 315(b) are §§ 314A and 320. Section 314A (1) - (3) list specific settings in which a duty to protect may be found — common carrier, innkeeper and possessor of land — and § 314A(4) adds an additional duty of protection for one who "takes the custody" of one in such a way "as to deprive the other of his normal opportunities for protection." Comment b clarifies the "relations listed are not intended to be exclusive," and observes the law is "working slowly toward a recognition of the duty to aid or protect in any relation of dependence."

Section 320 overlaps somewhat with § 314A(4), but includes an additional factor, contemplating liability for a defendant who subjects the victim "to association with persons likely to harm him." Comment b emphasizes the "helplessness" of the victim, and the requirement to provide protection when the victim is deprived "of the protection of someone who, if present, would be under a duty to protect him." It cites the example of a child being removed from parents' protection, and suggests the care due depends on the circumstances in which "custody" is "taken": "Therefore, the actor who takes custody ... of a child is properly required to give him

the protection which the custody or the manner in which it is taken has deprived him." Comment c states the duty is particularly appropriate when a victim is exposed to one who poses a risk of harm "from which he cannot be expected to protect himself." Significantly, while both §§ 314A and 320 reference custody, they do not speak of "retaining" or "exercising" custody, but instead, contemplate a party who "takes custody."

Washington case law examining the nature of the duty to protect under these Restatement sections has broadly described the doctrine as one in which a defendant has been "entrusted" with the responsibility of protecting another who is in some way vulnerable and in need of protection. *See Niece,* 131 Wn.2d at 50 (finding a duty owed by a nursing home to its resident and noting "[t]he duty to protect another person from the intentional or criminal actions of third parties arises where one party is entrusted with the well being of another" (citations omitted)); *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 201, 943 P.2d 286 (1997) (examining *Niece* and observing that "a duty to protect another person from the criminal acts of third parties may arise where a person is entrusted with the care of another"); *Smith v. Sacred Heart Medical Center*, 144 Wn. App. 537, 545, 184 P.3d 646 (2008) (noting a hospital's duty to protect patients "arises because the hospital is entrusted with the patient's well being");

Lauritzen v. Lauritzen, 74 Wn. App. 432, 440, 874 P.2d 861, *review denied*, 125 Wn.2d 1006 (1994) (noting that in all cases imposing a duty based on a "special relationship," the courts have found that the relationship involved an element of "entrustment"); *Funkhouser v. Wilson*, 89 Wn. App. 644, 660, 950 P.2d 501 (1992), *aff'd in part and remanded, C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999) (recognizing "[t]he entrustment aspect is what appears to us to underlie the imposition of the additional duty to protect someone from foreseeable criminal acts of third parties" (citations omitted; brackets added)).

The vulnerability of the person entitled to protection appears to be an additional important factor informing the concept of entrustment and ascertaining the existence and scope of any duty to protect. *See Niece*, 131 Wn.2d at 46 (recognizing that "[p]rofoundly disabled persons are totally unable to protect themselves and are thus completely dependent on their caregivers for their personal safety" (brackets added)); *Hutchins v. 1001 Fourth Ave. Associations,* 116 Wn.2d 217, 228, 802 P.2d 1360 (1991) (observing the duty to protect is warranted when a party is placed under the protection of another party in a way that results in "loss of control to protect himself or herself"); *McLeod v. Grant Cy. Sch. Dist. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953) (similar); *S.H.C. v. Lu,* 113 Wn. App. 511,

525-26, 54 P.3d 174 (2002), *review denied*, 149 Wn.2d 1011 (2003) (finding no duty where plaintiff was "unlike the victims who have been found to be vulnerable in other cases").

In sum, authorities bearing on the duty to protect seem to indicate that there are a variety of distinct bases on which a duty to protect may be found, only some of which may involve physical "custody." Moreover, to the extent custody is referenced, it speaks only of "taking" custody, and not exercising or retaining custody. The common principle found by Washington courts to unify these duties to protect is entrustment for the protection of a vulnerable victim.

2. The duty to protect is grounded in the entrustment of responsibility for protection of a vulnerable person, and because DSHS is entrusted with protecting foster children when it removes them from their homes and assumes responsibility for their safety, the Court should find DSHS has a duty under Washington law to protect the foster children in its charge.

While the Court has not had the opportunity to determine whether custody is necessary for a duty to protect, given the absence of an express requirement in either the applicable Restatements or case law, limiting the duty to protect to cases of physical custody would appear arbitrary.[7] Re-

[7] The Court has addressed the necessity for custody and control under §§ 315(a) and 319, and has consistently rejected these factors as prerequisites to the existence of a special relationship in that context. *See, e.g., Volk* 187 Wn.2d at 264-65; *Hertog*, 138 Wn.2d at 276-77; *Taggart*, 118 Wn.2d at 219, 223.

cently, this Court examined the role of custody in the context of a school's duty to protect its students, and held that the fact that resulting harm occurred outside a school's custody did not defeat liability. *See N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016). Similar to the State's argument presented here, the defendant in *N.L.* argued that because prior duty to protect cases had involved custody, the Court should preclude a duty outside the custodial context. *See N.L.*, 186 Wn.2d at 430-31. In refusing to so limit the duty, the Court seemed cognizant of the school's role as a substitute for parents and the student's resulting vulnerability. *See id.* at 431 (noting students are "compelled to attend school and [are] under the protective custody of teachers [which is] mandatorily substituted for that of the parent" (brackets added; citations and quotations omitted)).[8]

At least two courts of appeals have held the duty to protect under § 315(b) stems from entrustment and does not require custody. *See C.L. v. Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 196-99, 402 P.3d 346 (2017); *Caulfield v. Kitsap County*, 108 Wn. App. 242, 255, 29 P.3d 738 (2001). In *C.L.*, the court held "a tort duty . . . arises from the special rela-

[8] Significantly, the case at bar is, at least in one sense, more compelling than circumstances involving a school. In the school context, a student's release from the school's custody generally returns the student to the custody of the parents and relinquishes the school's responsibility. This is wholly different from the circumstance in which DSHS places a foster child in a foster home, where DSHS retains supervisory authority.

tionship between the department as a placement agency and dependent children, allowing such children to seek a tort remedy when they are damaged by the department's negligent failure to uncover pertinent information about their prospective adoptive home." *C.L.*, 200 Wn. App. at 197.

In *Caulfield,* the court found a special relationship where the county "assumed responsibility for monitoring and providing oversight and case management services to functionally impaired vulnerable adults." *Caulfield*, 108 Wn. App. at 247. It recognized the relationship under § 315(b) is "typically custodial," *id.* at 255, but "does not always require the presence of a custodial relationship" (citations omitted). It concluded:

> Caulfield's relationship with his County case manager involved an element of "entrustment" by virtue of the dependent and protective nature of the relationship. . . . Given Caulfield's inability to take care of himself, the case manager's responsibility for establishing and monitoring his in-home service care plan took on great significance. . . . And the case managers were required to make assessment visits. This responsibility gave rise to a duty to protect Caulfield and other similarly vulnerable clients from the tortious acts of others.

Caulfield, 108 Wn. App. at 256.

Here, the relationship between DSHS and the Plaintiffs has the same aspects of control and entrustment discussed in *Caulfield* and *C.L.* DSHS is charged with placing foster children in safe, appropriate homes, and providing ongoing monitoring for their safety. Notably, this Court has

recognized the "statutory purpose" of DSHS's supervisory role in the foster system is "protecting children."[9] *Sheikh v. Choe,* 156 Wn.2d 441, 450, 128 P.3d 574 (2006). In *Sheikh*, the Court reviewed the statutory scheme applicable to DSHS *vis a vis* foster children and observed:

> There are numerous statutory descriptions of the purposes underlying DSHS's child welfare division. . . . With direct reference to the sentiment expressed in these statutes, this court has recently stated that the statement of purpose encompasses two concerns: the integrity of the family and the safety of children within the family... Out of this declaration we find ... DSHS's child welfare system... *exists to protect abused children from harm.*

156 Wn.2d at 451-52 (quotations and citations omitted; italics added).

Even if the Court were inclined to require the presence of custody, it is satisfied here. While no Washington court has defined the term in this context, it would seem clear that DSHS "takes custody" of children, which is the language used by §§ 314A and 320 of the Restatement.[10] DSHS removes children from their homes, and remains obligated to monitor their placement "to assure the safety, well-being, and quality of care being pro-

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[9] In this respect, the relationship is somewhat analogous to cases from this Court in the duty to control context, in which a defendant has a duty based on supervisory, but not necessarily custodial, control. See e.g. *Taggart,* 118 Wn.2d at 219 (special relationship exists between parole officer and parolee despite lack of custody, on the basis of supervisory role); *Hertog,* at 282 (similar); *Joyce v. State,* 155 Wn.2d 306, 316-17, 119 P.3d 825 (2005); 155 Wn.2d at 316-17 (similar); *see also Webstad v. Stortini,* 83 Wn. App. 857, 869-70, 924 P.2d 940 (1996), *review denied,* 131 Wn.2d 1016 (1997).

[10] It bears repeating that the primary Restatement section discussed here — § 315(b) — makes no reference to any requirement of custody.

vided." RCW 74.13.031(6). By taking custody of children and retaining responsibility for their safety, the Court should find that DSHS has "custody" for purposes of creating a special protective relationship, as the Court of Appeals properly held. *See H.B.H.,* 197 Wn. App. at 91, n.5.

This Court has recognized that "[t]he common law owes its glory to its ability to cope with new situations, and its principles are not mere printed fiats but living tools to be used in solving emergent problems." *Afoa v. Port of Seattle*, 176 Wn.2d 460, 480, 296 P.3d 800 (2013) (brackets added). Determination of whether a duty may lie is a question of law for the Court, and involves "mixed considerations of logic, common sense, justice, policy, and precedent." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998) (citation omitted). Ultimately, the determination reflects "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." W. Page Keeton et al., Prosser and Keeton on Torts § 53, at 357-58 (5th ed. 1984). To make this determination, the Court must "balance the interests at stake." *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 450 , 243 P.3d 521 (2010).

Here, the State's interests in avoiding liability must be balanced against the safety of the State's foster children, who are among our most

vulnerable. As the entity that has been entrusted with ensuring their safety in the foster care system, this Court should hold that DSHS has a special relationship with the foster children in its charge, giving rise to a duty of protection under the common law.[1]

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving this appeal.

DATED this 8th day of January, 2018.

Valerie D. McOmie

Valerie D. McOmie for Daniel E. Huntington with authority

On Behalf of WSAJ Foundation

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[1] The State also argues that "[h]ad a common law duty to investigate or liability for special relationship existed, this Court would not have needed to find this implied cause of action." Pet. for Rev. at 13 (brackets added). This argument misapprehends the distinction between an implied cause of action and the development of the common law. While there is language in the Court's 2003 opinion *M.W.* that could support the State's contention, *see* 149 Wn.2d at 600, the Court recently clarified the implied cause of action doctrine in *Swank v. Valley Christian Sch.*, 188 Wn.2d 663, 679, 398 P.3d 1108 (2017). There, the Court explained that because the implied cause of action is a question of statutory interpretation, the presence of a common law cause of action is relevant only if there is evidence the Legislature intended the common law to provide the vehicle for vindicating the statutory right. *See Swank*, 188 Wn.2d at 679. Whether the Legislature intended a cause of action when enacting RCW 26.44.050 is conceptually distinct from whether the Court should find a common law duty in this context.

Appendix

WASHINGTON STATE LEGISLATURE

RCW 4.92.090

Tortious conduct of state—Liability for damages.

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

[1963 c 159 § 2; 1961 c 136 § 1.]

Restatement (Second) of Torts § 314A (1965)

Restatement of the Law - Torts

Database updated October 2015
Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

§ 314A Special Relations Giving Rise to Duty to Aid or Protect

(1) A common carrier is under a duty to its passengers to take reasonable action

(a) to protect them against unreasonable risk of physical harm, and

(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.

(2) An innkeeper is under a similar duty to his guests.

(3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.

(4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether there may not be other relations which impose a similar duty.

Comment:

a. An additional relation giving rise to a similar duty is that of an employer to his employee. (See § 314B.) As to the duty to protect the employee against the conduct of third persons, see Restatement of Agency, Second, Chapter 14.

b. This Section states exceptions to the general rule, stated in § 314, that the fact that the actor realizes or should realize that his action is necessary for the aid or protection of another does not in itself impose upon him any duty to act. The duties stated in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. There may be other such relations, as for example that of

husband and wife, where the duty is recognized by the criminal law, but there have as yet been no decisions allowing recovery in tort in jurisdictions where negligence actions between husband and wife for personal injuries are permitted. The question is therefore left open by the Caveat, preceding Comment *a* above. The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.

c. The rules stated in this Section apply only where the relation exists between the parties, and the risk of harm, or of further harm, arises in the course of that relation. A carrier is under no duty to one who has left the vehicle and ceased to be a passenger, nor is an innkeeper under a duty to a guest who is injured or endangered while he is away from the premises. Nor is a possessor of land under any such duty to one who has ceased to be an invitee.

d. The duty to protect the other against unreasonable risk of harm extends to risks arising out of the actor's own conduct, or the condition of his land or chattels. It extends also to risks arising from forces of nature or animals, or from the acts of third persons, whether they be innocent, negligent, intentional, or even criminal. (See § 302B.) It extends also to risks arising from pure accident, or from the negligence of the plaintiff himself, as where a passenger is about to fall off a train, or has fallen. The duty to give aid to one who is ill or injured extends to cases where the illness or injury is due to natural causes, to pure accident, to the acts of third persons, or to the negligence of the plaintiff himself, as where a passenger has injured himself by clumsily bumping his head against a door.

e. The duty in each case is only one to exercise reasonable care under the circumstances. The defendant is not liable where he neither knows nor should know of the unreasonable risk, or of the illness or injury. He is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate, or to give aid to one whom he has no reason to know to be ill. He is not required to take any action where the risk does not appear to be an unreasonable one, as where a passenger appears to be merely carsick, and likely to recover shortly without aid.

f. The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. In the case of an ill or injured person, he will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained. He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance.

Illustrations:

1. A, a passenger on the train of B Railroad, negligently falls off of the train, and is injured. The train crew discover that he has fallen off, but do nothing to send aid to him, or to notify others to do so. A lies unconscious by the side of the track in a cold rain for several hours, as a result of which his original injuries are seriously aggravated. B Railroad is subject to liability to A for the aggravation of his injuries.

2. A, a passenger riding on the train of B Railroad, suffers an apoplectic stroke, and becomes unconscious. The train crew unreasonably assume that A is drunk, and do nothing to obtain medical assistance for him, or to turn him over at a station to those who will do so. A continues to ride on the train in an unconscious condition for five hours, during which time his illness is aggravated in a manner which proper medical attention would have avoided. B Railroad is subject to liability to A for the aggravation of his illness.

3. A is a guest in B's hotel. Without any fault on the part of B, a fire breaks out in the hotel. Although they could easily do so, B's employees fail to call A's room and warn him to leave it. As a result A is overcome by smoke and carbon monoxide before he can escape, and is seriously injured. B is subject to liability to A.

4. A, a child six years old, accompanies his mother, who is shopping in B's department store. Without any fault on the part of B, A runs and falls, and gets his fingers caught in the mechanism of the store escalator. B's employees see

what has occurred, but unreasonably delay in shutting off the escalator. As a result, A's injuries are aggravated in a manner which would have been avoided if the escalator had been shut off with reasonable promptness. B is subject to liability to A for the aggravation of his injuries.

5. A, a patron attending a play in B's theatre, suffers a heart attack during the performance, and is disabled and unable to move. He asks that a doctor be called. B's employees do nothing to obtain medical assistance, or to remove A to a place where it can be obtained. As a result, A's illness is aggravated in a manner which reasonably prompt medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.

6. A is imprisoned in a jail, of which B is the jailor. A suffers an attack of appendicitis, and cries for medical assistance. B does nothing to obtain it for three days, as a result of which A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his illness.

7. A is a small child sent by his parents for the day to B's kindergarten. In the course of the day A becomes ill with scarlet fever. Although recognizing that A is seriously ill, B does nothing to obtain medical assistance, or to take the child home or remove him to a place where help can be obtained. As a result, A's illness is aggravated in a manner which proper medical attention would have avoided. B is subject to liability to A for the aggravation of his injuries.

Reporter's Notes

This Section has been added to the first Restatement.

Illustration 1 is based on Yazoo & M.V.R. Co. v. Byrd, 89 Miss. 308, 42 So. 286 (1906); Layne v. Chicago & Alton R. Co., 175 Mo.App. 34, 157 S.W. 850 (1913); Cincinnati, H. & D.R. Co. v. Kassen, 49 Ohio St. 230, 31 N.E. 282, 16 L.R.A. 674 (1892); Yu v. New York, N.H. & H.R. Co., 145 Conn. 451, 144 A.2d 56 (1958); Continental Southern Lines, Inc. v. Robertson, 241 Miss. 796, 133 So.2d 543, 92 A.L.R.2d 653 (1961), passenger injured through his own negligence.

Illustration 2 is taken from Middleton v. Whitridge, 213 N.Y. 499, 108 N.E. 192, Ann.Cas. 1916C, 856 (1915). Cf. Kambour v. Boston & Maine R. Co., 77 N.H. 33, 86 A. 624, 45 L.R.A. N.S. 1188 (1913); Jones v. New York Central R. Co., 4 App.Div.2d 967, 168 N.Y.S.2d 927 (1957), affirmed, 4 N.Y.2d 963, 177 N.Y.S.2d 492, 152 N.E.2d 519 (1958); Yu v. New York, N.H. & H.R. Co., 145 Conn. 451, 144 A.2d 56 (1958).

Compare, as to the duty of a carrier to protect its passengers from dangers arising from the conduct of third persons: Hillman v. Georgia Ry. & Banking Co., 126 Ga. 814, 56 S.E. 68, 8 Ann.Cas. 222 (1906); Nute v. Boston & Maine R. Co., 214 Mass. 184, 100 N.E. 1099 (1913); Kuhlen v. Boston & N. St. R. Co., 193 Mass. 341, 79 N.E. 815, 7 L.R.A. N.S. 729, 118 Am.St.Rep. 516 (1907); Exton v. Central R. Co. of New Jersey, 62 N.J.L. 7, 42 A. 486, 56 L.R.A. 508 (1898), affirmed, 63 N.J.L. 356, 46 A. 1099, 56 L.R.A. 512; Kinsey v. Hudson & Manhattan R. Co., 130 N.J.L. 285, 32 A.2d 497, 14 N.C.C.A.N.S. 692 (Sup.Ct.1943), affirmed, 131 N.J.L. 161, 35 A.2d 888 (Ct. Err. & App.); Harpell v. Public Service Coordinate Transport, 20 N.J. 309, 120 A.2d 43 (1955); Mulhause v. Monongahela St. R. Co., 201 Pa. 237, 50 A. 937 (1902); St. Louis, I.M. & S.R. Co. v. Hatch, 116 Tenn. 580, 94 S.W. 671 (1906); Kline v. Milwaukee Elec. R. Co., 146 Wis. 134, 131 N.W. 427, Ann Cas. 1912C, 276 (1911).

Illustration 3 is based on Dove v. Lowden, 47 F.Supp. 546 (W.D.Mo.1942); West v. Spratling, 204 Ala. 478, 86 So. 32 (1920); Stewart v. Weiner, 108 Neb. 49, 187 N.W. 121 (1922); Texas Hotel Co. of Longview v. Cosby, 131 S.W.2d 261 (Tex.Civ.App.1939), error dismissed; cf. Hercules Powder Co. v. Crawford, 163 F.2d 968 (8 Cir.1947).

Compare, as to the duty of an innkeeper to protect his guests from dangers arising from the conduct of third persons: Knott Corp. v. Furman, 163 F.2d 199 (4 Cir.1947), certiorari denied, 332 U.S. 809, 68 S.Ct. 111, 92 L.Ed. 387, rehearing denied, 332 U.S. 826, 68 S.Ct. 164, 92 L.Ed. 401; Fortney v. Hotel Rancroft, 5 Ill.App.2d 327, 125 N.E.2d 544 (1955); McFadden v.

Restatement (Second) of Torts § 315 (1965)

Restatement of the Law - Torts

Database updated October 2015
Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title A. Duty to Control Conduct of Third Persons

§ 315 General Principle

Comment:
Case Citations - by Jurisdiction

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

Comment:

a. The rule stated in this Section is a special application of the general rule stated in § 314.

b. Distinction between duty to act for another's protection and duty to act for self-protection. In the absence of either one of the kinds of special relations described in this Section, the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm. This is true although the actor realizes that he has the ability to control the conduct of a third person, and could do so with only the most trivial of efforts and without any inconvenience to himself. Thus if the actor is riding in a third person's car merely as a guest, he is not subject to liability to another run over by the car even though he knows of the other's danger and knows that the driver is not aware of it, and knows that by a mere word, recalling the driver's attention to the road, he would give the driver an opportunity to stop the car before the other is run over. On the other hand, under the rule stated in § 495, the actor is guilty of contributory negligence if he fails to exercise an ability which he in fact has to control the conduct of any third person, where a reasonable man would realize that the exercise of his control is necessary to his own safety. Thus if the actor, while riding merely as a guest, does not warn the driver of a danger of which he knows and of which he has every reason to believe that the driver is unaware, he becomes guilty of contributory negligence which precludes him from recovery against another driver whose negligent driving is also a cause of a collision in which the actor himself is injured.

Comment on Clauses (a) and (b):

c. The relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316- 319. The relations between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §§ 314A and 320.

Case Citations - by Jurisdiction

U.S.
C.A.1
C.A.3
C.A.4
C.A.6
C.A.7
C.A.8
C.A.9
C.A.10,
C.A.10
C.A.11
C.A.D.C.
C.A.Fed.
N.D.Ala.
D.Colo.
D.Conn.
D.Del.
D.D.C.
M.D.Fla.
S.D.Fla.
S.D.Fla.Bkrtcy.Ct.
M.D.Ga.
S.D.Ga.
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D.Idaho
C.D.Ill.
N.D.Ill.
N.D.Ind.
N.D.Iowa
S.D.Iowa
D.Kan.
E.D.Ky.
E.D.La.
W.D.La.
D.Md.
D.Mass.
W.D.Mich.
S.D.Miss.
D.Neb.
D.Nev.

Restatement (Second) of Torts § 320 (1965)

Restatement of the Law - Torts

Database updated October 2015
Restatement (Second) of Torts

Division Two. Negligence

Chapter 12. General Principles

Topic 7. Duties of Affirmative Action

Title A. Duty to Control Conduct of Third Persons

§ 320 Duty of Person Having Custody of Another to Control Conduct of Third Persons

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control.

See Reporter's Notes.

Comment:

a. The rule stated in this Section is applicable to a sheriff or peace officer, a jailer or warden of a penal institution, officials in charge of a state asylum or hospital for the criminally insane, or to teachers or other persons in charge of a public school. It is also applicable to persons conducting a private hospital or asylum, a private school, and to lessees of convict labor.

b. Helplessness of other. The circumstances under which the custody of another is taken and maintained may be such as to deprive him of his normal ability to defend himself, or to deprive him of the protection of someone who, if present, would be under a duty to protect him, or though under no such duty would be likely to do so. Thus the fact that a prisoner is handcuffed may make him incapable of defending himself against an attack, which he could otherwise have done. The very fact of imprisonment prevents a prisoner from avoiding attacks by flight. So too, a child while in school is deprived of the protection of his parents or guardian. Therefore, the actor who takes custody of a prisoner or of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.

c. Peculiar risks to which other exposed. The custody of another may be taken under such circumstances as to associate the other with persons who are peculiarly likely to do him harm from which he cannot be expected to protect himself. If so, the

actor who has taken custody of the other is required to exercise reasonable care to furnish the necessary protection. This is particularly true where the custody not only involves intimate association with persons of notoriously dangerous character, but also deprives the person in custody of his normal ability to protect himself, as where a prisoner is put in a cell with a man of known violent temper, or is required to work or take exercise with a group of notoriously desperate characters. In such a case, the fact that the person in custody is a prisoner precludes the possession of any self-defensive weapons, and thus makes him incapable of adequately protecting himself.

d. Duty to anticipate danger. One who has taken custody of another may not only be required to exercise reasonable care for the other's protection when he knows or has reason to know that the other is in immediate need of it, but also to make careful preparations to enable him to give effective protection when the need arises, and to exercise reasonable vigilance to ascertain the need of giving it. Thus if a sheriff or peace officer knows that public opinion is so violently incensed against his prisoner that there is danger of mob violence, he may be required not only to himself to defend the prisoner, but also to exercise reasonable care to secure assistance which will enable him to do so effectively. So too, a schoolmaster who knows that a group of older boys are in the habit of bullying the younger pupils to an extent likely to do them actual harm, is not only required to interfere when he sees the bullying going on, but also to be reasonably vigilant in his supervision of his pupils so as to ascertain when such conduct is about to occur. This is true whether the actor is or is not under a duty to take custody of the other.

Reporter's Notes

As to the duty of one who has taken charge of another to protect him by controlling the conduct of third persons, see People ex. rel. Coover v. Guthner, 105 Colo. 37, 94 P.2d 699 (1939); Ratliff v. Stanley, 224 Ky. 819, 7 S.W.2d 230, 61 A.L.R. 566 (1928); Lamb v. Clark, 282 Ky. 167, 138 S.W.2d 350 (1940); Honeycutt v. Bass, 187 So. 848 (La.App.1939); Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940); Hixon v. Cupp, 5 Okla. 545, 49 P. 927 (1897); Taylor v. Slaughter, 171 Okla. 152, 42 P.2d 235 (1935); Browning v. Graves, 152 S.W.2d 515 (Tex.Civ.App.1941), error refused; Kusah v. McCorkle, 100 Wash. 318, 170 P. 1023, L.R.A. 1918C, 1158 (1918); Eberhart v. Murphy, 110 Wash. 158, 188 P. 17 (1920), reversed on other grounds, 113 Wash. 449, 194 P. 415.

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C.A.4
C.A.7
C.A.8
C.A.10
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D.Colo.
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